# No. 14,517

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,

*Appellant,*

vs.

RUSSELL LOUIS LAROSE,

*Appellee.*

## BRIEF FOR APPELLANT.

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*Appellant,*

vs.

RUSSELL LOUIS LAROSE,

*Appellee.*

## BRIEF FOR APPELLANT.

### JURISDICTION.

This Court has jurisdiction of this case under Sections 2243 and 2253 of Title 28 United States Code.

### STATEMENT OF THE CASE.

Appellee petitioned for a writ of habeas corpus releasing him from the custody of appellant on April 20, 1954 (Tr. 8). His petition was on the grounds that his draft board had denied him procedural due

process of law in classifying him I-A-O and, therefore, his induction into the armed forces was unlawful (Tr. 3-8). United States District Judge George B. Harris issued an order to show cause why a writ of habeas corpus should not issue on April 21, 1954 (Tr. 8-9). On June 18, 1954 Judge Harris issued an order granting the petition for a writ of habeas corpus (Tr. 9-10). On June 24, 1954 Judge Harris issued the writ (Tr. 12). Appeal was then made to this Court from the order, judgment and decree of the Court issuing a writ of habeas corpus (Tr. 12-13).

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**FACTS.**

Appellee's Selective Service file, which is Petitioner's Exhibit No. 1, reveals that appellee registered for Selective Service on November 6, 1950. Appellee stated in his Special Form for Conscientious Objector that he was a member of the American Lutheran church, and said that sound reasoning and logical philosophy was the basis for his judgments with reference to conscientious objection (File 11-12). Appellee was classified I-A-O on January 22, 1952 (File 9).

Subsequently, appellee wrote two letters to the Local Board. One letter, which was apparently written February 1, 1952 and received by the Board on February 5, 1952 complained of the I-A-O classification (File 66). It began "I request *an appeal* of my classification." The last sentence of this letter reads "Please, carefully reconsider your classification. I

can ask of you nothing more." (File 67). The other letter, which was apparently written January 26, 1952 and received February 7, 1952, asks, among other things, "* * * your order for physical examination leads me to question how I have been classified, if at all, or if, through some unfortunate clerical error or misinterpretation, my being so ordered is a mistake." (File 62). At page 63 of the file, in the next to the last paragraph of his letter, referring to his conscientious objection, appellee states "I would also like to know how I, as a student, stand with your board, disregarding my conscientious objections." This letter was received by the Local Board two days after the first letter above referred to which requested an "appeal" and the Local Board to "reconsider your classification." Also, on February 7, 1952 the Local Board received a letter from the Director of Deep Springs College certifying that Mr. LaRose was enrolled at Deep Springs College as a full time student (File 61).

On March 20, 1952 the Local Board was sent SSS Form 109, College Student Certificate, by Deep Springs College (File 53). On April 22, 1952 appellee's classification was reopened by the Local Board, and he was reclassified from Class I-A-O to Class II-S (File 9).

On September 13, 1952 the Local Board was advised by the Director of Deep Springs College that appellee was no longer enrolled at the college (File 45). On September 23, 1952 appellee was reclassified to Class I-A-O (File 9). No appeal was taken from this classification.

Appellee was then ordered to report for induction on February 13, 1953 (File 9). After being inducted into the army (Tr. 45), appellee deserted (Tr. 48) and, after being apprehended, was transferred to the Presidio of San Francisco (Tr. 48). He then petitioned for a writ of habeas corpus (Tr. 3). It is the appeal from the issuance of a writ of habeas corpus issued pursuant to this petition that is presently before this Court.

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**REGULATIONS.**

Selective Service Regulation 1623.2

1623.2 *Consideration of Classes.*—Every registrant shall be placed in Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following table:

| Class: | | Class: | |
|---|---|---|---|
| I-A-O | | IV-A | |
| I-O | | IV-B | |
| I-S | | IV-C | |
| II-A | | IV-D | |
| II-C | | IV-F | |
| II-S | | V-A | |
| I-D | | I-W | |
| III-A | | I-C | |

Selective Service Regulation 1625.1

1625.1 *Classification Not Permanent.*—(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

Selective Service Regulation 1625.2

1625.2 *When Registrant's Classification May be Reopened and Considered Anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification * * *

## SPECIFICATIONS OF ERROR.

Appellant specified as error the following:

1. The Court erred in holding that a letter filed with a Local Draft Board appealing a classification deprives the Board of all jurisdiction over the registrant.

2. The Court erred in holding that the granting of a II-S classification without holding a hearing on a claim of a I-O classification was a denial of due process of law.

3. The Court erred in holding that petitioner was entitled to a writ of habeas corpus on the grounds that he was denied a right of appeal where the classification under which petitioner was inducted was not appealed.

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## QUESTIONS PRESENTED.

I. Did appellee exhaust his administrative remedies?

II. Was appellee deprived of due process of law?

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## SUMMARY OF ARGUMENT.

### I. APPELLEE HAS NOT EXHAUSTED HIS ADMINISTRATIVE REMEDIES.

Appellee was inducted by virtue of a I-A-O classification to which he was reclassified on September 23, 1952. At the trial below he claimed that the classification of II-S received on April 22, 1952 was invalid

because the Local Board had no power to reopen his case at that time. Appellee did not appeal from the September 23 I-A-O classification. He, therefore, did not exhaust his administrative remedies and has no standing to petition for habeas corpus. Furthermore, his claimed error does not apply to the classification under which he was actually inducted. It cannot be said that an invalidity in a prior classification carries over to a new classification by a Selective Service Board since this result would allow error once made to furnish complete exemption from service in the armed forces. Since the classification of I-A-O finally given by the Board is valid, the District Court erred in granting a writ of habeas corpus.

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## II. APPELLEE WAS NOT DEPRIVED OF DUE PROCESS OF LAW.

Appellee wrote two letters to his local draft board. In one he used the word "appeal" but ended "Please, carefully reconsider your classification. I can ask of you nothing more." In the other letter he requested consideration as a student. The Second Circuit in *United States v. Vincelli,* 215 F. 2d 210, has held considering an analogous letter as a request for an appeal was improper. If the result in the present case is allowed to stand, the Selective Service System is on the horns of a dilemma for no matter which way they interpret letters like appellee's the registrant may claim his classification has been invalidated. In the present case the material in the file fairly indi-

cates a desire on the part of appellee to have the Board reconsider and reclassify him. The Selective Service Board gave him exactly what he asked for. He was not prejudiced through the lack of an appeal. The Local Board under Regulation 1623.2 was required to classify appellee in the lowest classification to which he was entitled. Since II-S was a lower classification than I-O, it would have been an idle act to hold a conscientious objector hearing at that time. Such a requirement is not required by law and would create an unnecessary administrative burden.

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## ARGUMENT.

### I. APPELLEE HAS NOT EXHAUSTED HIS ADMINISTRATIVE REMEDIES.

Appellee, in the Court below, attacked his classification of II-S by the Local Board on the ground that the Local Board had no jurisdiction to act after appellee had written the Board a letter in which he requested what he termed an appeal. Appellee, however, was not inducted into the army by virtue of this classification. The classification under which he was inducted was that of I-A-O to which he was reclassified on September 23, 1952 (File 9). He received this classification more than five months after the II-S classification which he attacked (File 9). No appeal was taken by appellee from either the II-S classification or the I-A-O classification which finally resulted in his induction.

Before any judicial review may be had in a Selective Service case, the registrant must complete the administrative procedure which has been provided under the Universal Military Training and Service Act of 1948. *Mason v. United States* (9th Cir.), No. 14,286; *Williams v. United States* (9th Cir.), 203 F. 2d 85, 88; *Falbo v. United States,* 320 U.S. 549, 554; *Estep v. United States,* 327 U.S. 114.

If, in fact, LaRose was injured by the action of the Local Board reopening and reclassifying him instead of forwarding his file to the Appeal Board, that injury could have been cured by an appeal following his I-A-O classification.

Under a somewhat similar set of facts, this Court has recently held (*Skinner v. United States* (9th Cir.), 215 F. 2d 767) that objections which may have had merit on appeal were waived by a failure to appeal. In that case also there was a classification making the registrant liable for service followed by a change of classification and thereafter a reclassification not appealed which formed the basis of the registrant's induction. Assuming, but not conceding, that the Local Board erroneously reopened LaRose's classification, nevertheless that error, if any, could have been cured if LaRose had appealed the classification under which he was inducted.

Let us assume that the Local Board, upon reopening appellee's classification on April 22, 1952, had classified him I-A instead of the II-S classification he actually received. Appellee, when he petitioned for a writ of habeas corpus, would then be bringing into

question the validity of the classification under which he was inducted. However, that is not the case here. LaRose is not questioning the classification given to him by the Local Board on April 22, 1952 but is in fact questioning the classification given him by the Board some five months later on September 23. Admittedly, appellee did not appeal from this classification.

Since appellee did not appeal from the classification under which he was inducted, he has no standing to question the procedure of the Board. *Skinner v. United States, supra.*

Appellee was classified I-A-O by the Selective Service Board on September 23, 1952. No question was raised in the Court below concerning the basis in fact for this classification. It is apparent that the Local Board could properly have so classified him. (Appellee indicated at pages 11 and 12 of his file that he was a member of the Lutheran Church and that reasoning and logical philosophy were the basis for his objections to conscientious objection. From a study of the whole file the Local Board could have concluded that LaRose's proper classification was I-A-O.) It was this classification that resulted in LaRose's induction. If there was procedural error in classifying him II-S, that error was removed when the Board reopened the classification on September 23. At that time a new classification was given which appellee had an opportunity to question if he so desired. This classification was supported by material in the file. Appellee has not claimed that this classi-

fication was arrived at improperly. When appellee was no longer attending school he was no longer entitled to a II-S classification.

The regulations provide that no classification is permanent. *Selective Service Regulation 1625.1.* When a change in status resulted the Board was under a duty to reclassify the registrant. *Tyrell v. United States* (9th Cir.), 200 F. 2d 8, 11, 12. It cannot be said that any error committed at any time under prior classifications by a local board so invalidates the classification procedure that a registrant may never be called to military service.

Holding the classification of September 23, 1952 invalid infers that a taint was carried over from the classification of April 22, 1952. Such a result could not have been the intention of Congress since, for all practical purposes, an error once made would then furnish complete exemption from service in the armed forces. This Court has in analogous cases denied such a construction of the law. *Cramer v. France* (9th Cir.), 148 F. 2d 801; *Tyrell v. United States,* supra.

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## II. APPELLEE WAS NOT DEPRIVED OF DUE PROCESS OF LAW.

Appellee wrote two letters to his Local Board in late January and early February of 1952 (File 61, 62, 63, 66, 67). These letters were apparently received by the Local Board in reverse order from the sequence in which he wrote them. The letter first received by the Board began "I request *an appeal* of my classi-

fication" but ended "Please, carefully reconsider your classification. I can ask of you nothing more." (File 66, 67). It is this letter that the District Court feels constituted a request for an appeal, the denial of which deprived appellee of due process of law.

This letter is more or less ambiguous. It could be considered as a request for an appeal. On the other hand, it could be considered as a request to reopen under Regulation 1625.2(1). The Second Circuit in *United States v. Vincelli,* 215 F. 2d 210, has recently held that a letter starting "I hereby appeal my I-A classification for above mentioned reasons" was a request for a reconsideration, and held it was a denial of due process to consider it an appeal instead of reopening the registrant's classification. The Selective Service System is presently on the horns of a dilemma. If they consider such letters as written by LaRose as requests for appeals, the classification is subject to attack under *United States v. Vincelli,* supra. If they consider it as a request to reopen, the classification is subject to attack on the basis of the decision of the Court below. The letter in the instant case seems to request reopening under the regulation above cited even more vigorously than in the *Vincelli* case. How can a board receive any more direct request than "Please, carefully *reconsider* your classification. I can ask of you nothing more." (Italics supplied.)

Furthermore, the Local Board received on February 7, 1952, two days after the letter above referred

to, another letter which questioned his classification and requested advice in this matter. "I would also like to know how I, as a student, stand with your board, disregarding my conscientious objections." Also on that same day the Local Board received a letter from the Director of Deep Springs College certifying that appellee was enrolled at that college as a full time student (File 61). The Board under Regulation 1625.2(2), on its own motion, could reopen the classification if it received facts not previously considered when the registrant was classified. The college student certificate received March 20 certainly justified such action by the Board (File 53). The Local Board, when supplied with this new information and after receiving a letter asking it to reconsider its classification, was justified, if it was not compelled to reopen and reconsider appellee's classification. See *Brown v. United States* (9th Cir.), 216 F. 2d 258, 269.

Appellee received exactly what he asked for. He requested the Local Board to give him consideration as a student (File 63). The Local Board gave him that classification. This Court has held that "procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded." *Knox v. United States* (9th Cir.), 200 F. 2d 398, 401. See also *Tyrell v. United States,* supra; *Martin v. United States*, 190 F. 2d 775.

It cannot be said that the lacking of an appeal in this case prejudiced LaRose in any manner. The administrative body was required under its regula-

tions to classify him in the lowest classification to which he was entitled. *Selective Service Regulation 1623.2.* Under this regulation, since material appeared in the file showing that LaRose was a full time college student, his proper classification was II-S and the Local Board or the Appeal Board could not properly classify him I-O as he requested. Holding a hearing on his conscientious objection would at that time have been an idle act. If and when the registrant was reclassified other than II-S, the time would come for holding a conscientious objector hearing. That time arrived in LaRose's case on September 23, 1952. LaRose, however, did not at that time request a hearing or an appeal. The finding of the Court below with respect to the necessity for a conscientious objector hearing at the time of the II-S classification has no support in the regulations or statutes. Such a requirement does not seem proper. The classification should be made with respect to the conditions at the time.

The duty of local draft boards to classify and reclassify registrants is one of continual recurrence. *Tyrell v. United States,* supra, page 11. It is incumbent upon the local board to survey its personnel and examine its files in light of world conditions. *Tyrell v. United States,* supra, page 12. In the *Tyrell* case this Court held that it was proper for the Selective Service Board to reconsider a conscientious objector case when a change in conditions occurred.

It cannot be said that the Board was required to give consideration to a I-O classification when the

registrant was entitled to a deferred classification lower on the scale. See Selective Service Regulation 1623.2. If the registrant was IV-F or I-C or some other classification, it cannot be said that it is the duty of the Board to hold a hearing with respect to all other classifications to which the registrant might conceivably be entitled. If, for example, LaRose was over age and classified V-A, the Local Board should not be required to inquire into his conscientious objector status. Such a requirement would create an unnecessary administrative burden and is not required by law.

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## CONCLUSION.

Appellee failed to exhaust his administrative remedies and, the District Court should not have exercised jurisdictional review in his case. But, assuming but not conceding, that some jurisdictional review could be had, the District Court did not correctly decide the present case. The Court issued a writ of habeas corpus despite the fact that the classification under which appellee was inducted was not ever under attack. Its decision requiring an appeal is in conflict with the decisions of other Courts. Furthermore, the Court found a deprivation of due process of law in a case where the registrant could not conceivably have been prejudiced and, in fact, received exactly what he asked for. The writ of habeas corpus heretofore issued in the above-entitled case should be dis-

charged and appellee returned to the custody of appellant.

Dated, San Francisco, California,
January 12, 1955.

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